"This right of privacy," Blackmun maintained, whether grounded in the ninth Amendment or in the Due Process Clause: is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. Blackmun explained that the harm that a state inflicts upon a woman when it denies her this choice is obvious.

> Specific and direct harm medically diagnosed even in early pregnancy may be involved. Maternity, or additional offspring, ay force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.

On the other hand, Blackmun made clear that recognizing the existence of a right does not mean that the right is "absolute." Rather, as with other constitutional rights, there are circumstances when the right of privacy might be regulated, consistent with the Constitution, in the face of compelling government interests. Turning specifically to the regulation of abortion, Blackmun declared that, in at least some circumstances, the government's interests "in safeguarding health, in maintaining medical standards, and in protecting potential life" might be "sufficiently compelling" to justify restrictions on a woman's right to terminate an unwanted pregnancy. The next question, of course, was which, if any, of the state's asserted interests in regulating abortion met that standard.68

IN DEFENSE of its absolute prohibition on abortion except when necessary to save the life of the woman Texas maintained that human life began at conception and that its interest in preserving the life of unborn children was sufficiently compelling to override any constitutional right of a woman. Blackmun rejected this argument noting that even "those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus" on the profound religious, moral, and scientific question of when human life begins, Blackmun reasoned that neither the state of Texas nor the Supreme Court is "in a position to speculate as to the answer." In such circumstances, he

concluded, the state, by

merely asserting "one theory of life," cannot declare a purported interest to be "compelling" in order to set aside "the rights of the pregnant woman."69

Blackmun also held, however, that after the first trimester, as the possible health risks to the woman increase, the government can reasonably regulate the abortion procedure in order to protect the woman's health. He noted, for example, that after this point in a pregnancy the state can reasonably regulate such matters as the qualifications of those who are authorized to perform an abortion and the types of facilities in which an abortion may be performed.

Blackmun finally turned to the government's interest in protecting "potential life." This interest, he concluded, becomes compelling at the point of fetal viability. Blackmun explained that this made sense because, at this stage in a pregnancy, the fetus has the ability to live "outside the mother's womb," and the government can therefore protect fetal life at that point without intruding on the right of the woman not to be pregnant. Blackmun emphasized, however, that even after this point in pregnancy the government cannot constitutionally forbid a woman to have an abortion if the procedure "is necessary to preserve the life or health" of the woman. 10

JUSTICE BYRON WHITE, joined by Justice William Rehnquist, dissented. White, a Kennedy appointee, was generally quite conservative on such issues as obscenity, contraception, and abortion. In a brief opinion, he declared that he found "nothing in the language or history of the

* In the initial draft of his opinion in Roe, Blackmun had limited the right to terminate pregnancy, except when necessary to preserve the health or life of the woman, 10 the first truJlCSlC'f Justices Powelal and Marshall persuaded him to focus on the viability issue and to extend the right through the end of the second

trimester. See Michael. Graetz& Linda Greenhouse, The art of Court and The Rise of the Judicial Right 14445 (Simon & Schuster2016).

Constitution to support the Court's judgment." In his view, the Court in Roe "simply fashions and announces a new constitutional right for pregnant mothers." White insisted that in an area as "sensitive" as abortion, the matter "should be left with the people and to the political processes the people have devised to govern their affiairs."71

In a separate dissenting opinion, Rehnquist conceded that if "the Texas statute were to prohibit an abortion even where the mother's life is in jeopardy," it would be unconstitutional because it "would lack a rational relation to a valid state objective." But the very fact that a majority of the states "have had restrictions on abortions for at least a century," he reasoned, is a "strong indication" that the right to abortion "is not 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" That being so, he concluded, there was no legitimate basis for the Court to find such a right in the Constitution.72

REACTION

MANY AMERICANS TODAY think of Roe v. Wade as a radical, leftwing decision. That was not the view at the time. By 1973, a substantial majority of Americans supported the right of a woman to terminate an unwanted pregnancy. Gallup polls showed that "two out of three Americans think abortion should be a matter for decision solely between a woman and her physician." Thus, at the time of the decision, the justices "had every reason to suppose that they were embracing a broad national consensus."73 Moreover, as we have seen, lower courts were already moving in a direction that clearly anticipated Roe. Strikingly, three of the four justices appointed to the Supreme Court by President Richard Nixon joined the decision. In light of Nixon's determination to appoint "conservative" justices who, unlike their Warren Court predecessors, would be committed to a position of judicial restraint, it is telling that Blackmun, Powell, and Burger all voted as they did. Indeed, without the support of these three Nixon appointees, Roe would have come out the other way. That Burger, Blackmun, and Powell joined Douglas, Brennan, Stewart, and Marshall in Roe speaks volumes about the mainstream nature of the decision at the time.

Indeed, it is worth noting for the sake of comparison that at the very moment that the justices were contemplating Roe, they were also in the process of deciding the 1973 obscenity cases Miller and Paris Adult Theatre in Which Burger, Blackmun, and Powell parted company with Douglas, Bren

nan, Stewart, and Marshall, and joined instead with Justices White and Rehnquist to embrace a sharply conservative view of the First Amendment right of sexual expression. *

The plain and simple fact is that at the time Roe was decided, Blackmun, Burger, and Powell did not view the abortion issue as posing a particularly ideological question. Although all of the justices understood that Roe addressed a highly emotional and important issue, none of them imagined that it would become a flash point of American politics or that it would continue to shape those politics for decades to come.

This understanding of Roe is consistent with both the news coverage and the public reaction at the time. Because Lyndon Johnson died on the same day that the Court announced its decision in Roe, newspapers, magazines, and news shows treated the Court's decision as only a secondary headline. The primary story was the death of the former president. U.S. News & World Report, for example, described Roe as "a historic resolution of a fiercely controversial issue," but did not even mention it on the front page of that week's issue. Forty years later, the editors observed correctly that "the far reaching effects of the decision weren't evident at the time."74

The editorials and commentary about Roe in the days after the decision were generally approving. Even newspapers in Georgia and Texas, whose laws had been held unconstitutional, were supportive. The Atlanta Constitution characterized the decision as "realistic and appropriate," the Houston Chronicle called it "sound," the San Angelo Standard Times applauded it as "wise and humane," and the San Antonio Light gushed that although the ruling was "not perfect, ... it was as close to it as humanly possible."75 These responses were not surprising in light of the fact that the American people clearly endorsed the decision. In polls taken at the time, Americans approved of Roe by a margin of 52 to 41 percent.76

To put that in perspective, it is instructive to compare the public's reaction to Roe with its reaction to other more controversial decisions. In 1962, for example, after the Supreme Court held prayer in public schools unconstitutional, 79 percent of the American people disapproved of the decision. In 1967, after the Court held laws prohibiting interracial marriage unconstitutiona1,78 72 percent of Americans disapproved. In 2010, after

The Court held laws limiting corporate campaign expenditures unconstitutionl,79 8 percent of Americans disapproved.80 But only 41 percent of Americans disapproved of Roe. Indeed, one measure of how uncontroversial

* See chapter 12.

Roe was at the time is that when resident Gerald Ford nominated John Paul Stevens to succeed Justice Wilham Douglas in 1975, not a single senator asked Stevens a question about Roe or about his views on abortions. 1

Even evangelicals did not condemn the decision. In 1973, most evangelicals "regarded abortion as a Catholic issue." Moreover, even evangelicals who did not share that view did not make a fuss over the decision. Indeed, it was not until the end of the decade that the evangelical community finally changed its tune and began to focus negatively on Roe as an important religious, moral, and political issue as part of the emerging Culture Wars. 2

THE ONE group that did strongly condemn Roe from the very moment of the decision was Catholics, who disapproved of the decision by a margin of 56 to 40 percent.83 This was hardly surprising, in light of the fierce legislative battles that had preceded Roe and that had often been driven by Catholic opposition to abortion. Within days of the decision, thousands of telegrams and letters of protest from Catholics inundated the Supreme Court. Whole classes of Catholic school students, directed by their teachers, wrote in an organized campaign to denounce the justices as "murderers" and "butchers." For several weeks, the letters arrived at the rate of 2,000 to 3,000 per day.

The vast majority were addressed either to Justice Blackmun, the author of the opinion, or to Justice Brennan, the Court's only Catholic justice. In Brennan's words, "The rhetoric and tone of the majority of the letters was extremely vitriolic." *84 Some went so far as to call for Brennan's excommunication from the Church. Many of the letters to Justice Blackmun invoked God's wrath and attacked him as "a baby killer." Blackmun noted that he had "never before been so personally abused and castigated." For the next several years, antiabortion picketers, often carrying ugly placards, picketed Blackmun and Brennan at all of their public appearances.85

*Justice Brennan had to reconcile his own personal religious views with his responsibilities as a justice of the Supreme Court. In 1987, he confided privately that "I wouldn't under any circumstances condone an abortion in my private life," but, he added, "that has nothing to do with whether or not those who have different views are entitled to have them and are entitled to be protected in their exercise of them. That's my job in applying and interpreting the Constitution." Brennen was quite sensitive to his fundamental responsibility to separate his religious views from his obligations as a Justice of the Supreme Court. He later observed that "·it never crossed my mind. never, not the slightest that my faith had a damn thing to do with how I decided the abortion case."

New York's Terence Cardinal Cooke condemned the Court, asking, "How many millions of children ... will never live to see the light of day because of the shocking action of the majority of the United States Supreme Court today?" John Joseph Cardinal Krol of Philadelphia, the president of the National Conference of Catholic Bishops, called Roe "an unspeakable tragedy" and declared that "it is hard to think of any decision in the two hundred years of our history which has had more disastrous implications for our stability as a civilized society." And the National Conference of Catholic Bishops declared that the decision in Roe corrupted "the moral order."[86]

In the years after Roe, the involvement of the Catholic hierarchy in American politics increased to an unprecedented level, with bishops devoting more time, energy, and money to abortion than to any other issue. Shortly after Roe, Catholic leaders created the National Right to Life Committee (NRLC), which recruited nonCatholics as well as Catholics and which eventually became the largest antiabortion organization in the nation.

The first formal challenge to Roe came in the form of Catholics sought proposed amendments to the Constitution to override the decision. On January 30, 1973, only eight days after Roe was announced, Republican Congressman Lawrence Hogan of Maryland introduced the first of many versions of a proposed "human life" amendment. Hogan's proposed amendment would have prohibited the United States or any state to "deprive any human being, from the moment of conception, of life without due process of law."87 Over the course of the next several decades, many more such proposals were presented to Congress. The campaign to overturn Roe v. Wade was officially underway.

IN ADDITION to those who objected to *Roe* on religious grounds, there were other critics as well. Some shared the view of Justices White and Rehnquist that the Constitution simply does not protect either a general right of privacy or a more specific right of a woman to decide for herself whether "to bear or beget a child." Put simply, these critics disagreed with the Courts Judgment that a constitutional right was at stake in Roe. 88 The critics argue that even if the Constitution protects a right of privacy, and even if that right is broad enough to encompass a woman's right to decide for herself whether to bear or beget a child, that's in the interest of protecting human life or potential human life is sufficiently compelling to override that constitutional right.

Even among those who agreed with Roe's conclusion that the Texas law was unconstitutional, there were critics of Justice Blackmun's opinion. One such criticism turned on Blackmun's emphasis on the role of the doctor and on the right to privacy, rather than on the way in which antiabortion laws discriminate against women. On this view, the problem with laws prohibiting abortion was not so much that they impaired a woman's right to privacy, but that they reinforced traditional sexual stereotypes and turned women's capacity to bear children into a serious personal, social, and economic disadvantage.

Another criticism lodged by some who agreed that the Texas law was unconstitutional was that the Court had gone too far, too fast. These critics maintained that the Court should have invalidated the Texas law because it allowed abortion only to save the life of the woman, but that it should have left the constitutionality of all other possible restrictions on abortion to the future. These critics argued that by overreaching, Roe unnecessarily ignited a destructive backlash. Justice Ruth Bader Ginsburg, for example, has consistently argued that by venturing "too far in the change it ordered" Roe "stimulated the mobilization of a right to life movement" and put an end to the legislative progress that was already underway.90

TO BOLDLY GO ... OR NOT?

WHY DID THE COURT eschew this more modest approach? Why did it reach out beyond what was absolutely necessary to decide the case before it and address such issues as trimesters, viability, and medical regulations? Given that public opinion clearly supported the right of a woman to terminate an unwanted pregnancy, why did the justices feel the need to move so far, so fast? If the state legislatures would eventually have reached the same outcome themselves, shouldn't the justices have let the issue percolate through the political process and addressed the constitutional question in a more incremental manner, one issue and one case at a time, as they arose over the years?

Several considerations explain why the Court moved as boldly as it

* One reason why the justices did not take this approach in *Roe* is that at the very same time that the Justices were putting the finishing touches on the opinion on *Roe,* they were wresting *conclusively with* the question of how to deal with constitutional challenges to laws that expressly discriminated against women. See *Frontiero v. Richardson,* 411 U.S. 677 (1973).

did. First, and perhaps most obviously, it was clear by 1973 that despite the state of public opinion most legislatures were unlikely to act on the majority view anytime soon. Only four states had enacted an approach similar to the one embraced in Roe, none had done so since 1970, the New York law had come within a hair's breadth of being repealed, and by 1973 no new laws like those enacted in Hawaii, Alaska, Washington, and New York were even remotely on the horizon. The plain and simple fact is that by 1973 the power of determined, passionate, single issue voting had effectively frozen the legislative process. As scholars of the era have observed, even in states where the opponents of liberalizing abortion laws were substantially outnumbered, they were single issues focused and passionate in moral conviction." It was thus clear by 1973 that any further progress in the state legislatures was likely to be slow, painful, and halting, at best. 91

Second, although patience may be a virtue in most circumstances, it is not necessarily a virtue when legislative paralysis denies millions of Americans a fundamental constitutional right and causes as many as a million women each year to resort to dangerous, degrading, and illegal back alley abortions. It must have seemed clear to the justices that the option of sitting back and patiently letting the state legislatures dither over these issues for five, ten, or twenty years was not a responsible option.

Third, the justices may have felt impelled to act decisively in Roe because they recognized that many state legislatures were inhibited from carrying out the will of the majority in this context because of pressure from religious organizations. In its 1961 decision in McGowan v. Maryland,92 the Court had made clear that the First Amendment prohibits legislation that has a predominantly religious purpose. Although the First Amendment vigorously protects the right of religious groups to try to persuade others to accept their beliefs and to act upon those beliefs in their personal capacities, it precludes them from enlisting the power of the state to compel others to act in accord with those beliefs. The justices clearly understood the central role that religion played in the opposition to abortion and this concern may well have made them more reluctant than usual to defer to the "ordinary" workings of the legislative process.

In any event, and whatever the reason or combination of reasons for the Court's decision to act as decisively as it did in Roe it is clear that the Justices intended in Roe to settle the abortion issue then and there, once and for all.

It turned out not to be that simple.